Filed 11/27/17 P. v. Acosta CA5

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

EDGARDO ACOSTA,

Defendant and Appellant.

F071683

(Super. Ct. No. BF156178A)

OPINION

APPEAL from a judgment of the Superior Court of Kern County. Thomas S. Clark, Judge.

Peter Dodd, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Carlos A. Martinez and Kari Ricci Mueller, Deputy Attorneys General, for Plaintiff and Respondent.

-ooOoo-

INTRODUCTION

During a brawl involving members of two neighboring families, appellant Edgardo Acosta shot a combatant in the shoulder with a small handgun, and a bullet struck appellant's own 13-year-old daughter, M.A., in her forehead. Both victims recovered from their wounds. At trial, appellant contended that he fired the gun in defense of another. A jury found him not guilty of attempted murder (Pen. Code, §§ 664/187, subd. (a);[1] count 1), but guilty of the lesser included charge of attempted voluntary manslaughter (§§ 664/192, subd. (a); count 1) and guilty of child endangerment (§ 273a, subd. (a); count 2). The jury found true that he personally inflicted great bodily injury upon both victims (§ 12022.7, subd. (a)) and he used a firearm in both crimes (§ 12022.5, subd. (a)). Finally, as to both victims, the jury found him not guilty of either assault with a firearm or simple assault (§§ 245, subd. (a)(2), 240; counts 3 & 4). He received an aggregated prison sentence of eight years.

On appeal, appellant raises various constitutional claims regarding the admission of his recorded statements to a child protective services (CPS) employee. He further raises claims of insufficient evidence and instructional error. Finally, he argues that the trial court erred in permitting a deputy district attorney to testify at trial. We affirm.

BACKGROUND

I. Relevant Trial Evidence Regarding The Shooting.

On July 18, 2014, appellant's family and the Burgara family were neighbors in Bakersfield, California. On that day, a fistfight started between various members and associates of the two families. At trial, extensive testimony explained how and why the altercation began that day, and who was responsible for starting the fight. For purposes of the present appeal, however, why and how the fight started is irrelevant. During

---

[1] All future statutory references are to the Penal Code unless otherwise noted.

closing arguments at trial, appellant's defense counsel conceded that appellant fired a gun during the fight, but argued that appellant acted to protect a friend, Jose Licea.

A. The fistfight.

Licea was a 19 year old who lived in the neighborhood and frequented appellant's home. Licea was described as being "like a son" to appellant. Appellant's daughter, M.A., thought of Licea as a brother.

During the altercation, Licea and Juan Carlos Burgara fought each other, at least for a time, one-on-one. They both ended up on the ground and some witnesses described them as "wrestling" and "rolling" together.

Some evidence suggested that appellant tried to separate the two combatants. However, other evidence suggested that appellant joined in the fight and was either punching Burgara family members and/or being punched himself.

At some point, the evidence suggests that Fernando Burgara,[2] who is Juan Carlos's brother, and Raul Barroso, who is their cousin, began to strike Licea with punches and/or kicks. Around this time, Juan Carlos had Licea in a headlock or chokehold.

At trial, Burgara witnesses claimed that appellant's girlfriend, Lissette Navarro, and two of appellant's daughters, including M.A., wielded various objects during the fight.[3] Some of the Burgara witnesses testified that Navarro and M.A. struck Juan Carlos with either a bat, a brick or a wrench. However, at trial, M.A. denied that she ever had a

---

[2] Because Juan Carlos and Fernando Burgara share the same last name, we refer to them by their first names. No disrespect is intended.

[3] Navarro was a codefendant in appellant's trial. The jury found her not guilty of being an accessory (§ 32; count 5) and not guilty of assault with a deadly weapon (a baseball bat) on Juan Carlos (§ 245, subd. (a)(1); count 6). Navarro is not a party to the present appeal.

brick in her hand. She testified that she tried to help Licea by pulling him away, and she tried to push Juan Carlos off Licea. M.A. testified that she was scared, she thought Licea looked "really hurt" and she thought "they" were going to kill him. M.A.'s friend, R.P., who was 13 years old, lived in the neighborhood and witnessed the fight. R.P. testified that he was scared because Licea was getting kicked and the fight lasted a long time.[4]

B. Appellant obtains a gun and shoots Juan Carlos and M.A.

The evidence is in conflict regarding how appellant obtained a gun during the fight. Some testimony suggested that Navarro ran into appellant's residence and returned with a handgun, which she gave to appellant. Other testimony, however, suggested that appellant left the fight to retrieve the gun from his residence. Still other testimony suggested that appellant might have possessed a gun before the fight started.

While Juan Carlos was crouching down on Licea, who was on the ground, appellant stood over Juan Carlos and fired a small revolver at Juan Carlos's back, striking him on his left shoulder. Appellant was approximately two feet from Juan Carlos when he fired. Juan Carlos received two bullet wounds. M.A. had been standing very close to Juan Carlos when appellant fired, and a bullet struck her forehead. Some evidence suggested that appellant handed the gun to Licea before he rushed to M.A.'s side.

C. The 911 calls.

Fernando's girlfriend, Guadalupe Arevalo, witnessed the fight and called 911. She reported that a girl had been accidentally shot in the head by her father during a fight.

---

[4] The jury heard relatively extensive impeachment evidence regarding the various participants' prior criminal convictions and alleged prior bad acts. Because a majority of this impeachment evidence is not material to the issues raised in the present appeal, a summary of that testimony has been omitted from this opinion. We note, however, that the jury learned that Juan Carlos pled to felony charges stemming from an incident in 2012 where he hit a female friend "once or twice" but claimed self-defense.

Navarro called 911 to report that M.A. had been shot. When asked who had shot her, Navarro responded that she did not know but she referred to "three people from across the street[.]"

Two other bystanders also called 911. The first, Lisa Lopez, had been in a vehicle driving near appellant's residence when the fight occurred. In her 911 call, she reported four males fighting, and somebody was lying "lifeless in the street." She said that someone was in a chokehold. She heard a "pop" sound and she saw a young female bleeding from her head. At trial, Lopez testified that she saw one man on the ground while three or four men were hitting, kicking and stomping him. She believed the man on the bottom "was being overpowered by other people."

The second bystander, John Zepeda, was also in a vehicle and observed two males fighting. One male eventually went to the ground, while three males began to hit and kick him. There were about five other people in the immediate area, including a female with a bat, but she did not use it on anyone. Zepeda heard a gunshot and saw a young female fall to the ground. Zepeda drove home before he called 911. At trial, he said he was hesitant to contact authorities because he did not want to get involved.

II. Law Enforcement's Investigation.

Sheriff deputies responded to the scene. A wrench and a baseball bat were recovered on appellant's driveway. Deputies searched appellant's home. The gun was never recovered but a gun holster was found in the kitchen. Deputies did not find any spent shell casings around the crime scene.

At the crime scene, appellant informed a deputy that he was inside his house when he had heard screams. He came out of his house and saw that M.A. had been shot. He denied hearing any gunshots and he denied knowing who had fired a gun. Members of

the Burgara family, however, informed other deputies that appellant had fired a revolver during the incident. Deputies arrested appellant.

III. The Medical Evidence.

M.A. was transported to a local hospital. The treating emergency room physician testified that she suffered a 1.5-centimeter gunshot wound to her forehead. A CT scan showed evidence of intracranial hemorrhaging and a depressed skull fracture. The treating emergency room physician believed M.A. would require neurosurgery. She was transported to a different medical facility. M.A. eventually recovered from her wound and she testified at appellant's trial.

Juan Carlos went to the hospital. He had two 1.5-centimeter gunshot wounds to the back of his left shoulder. He also had some scrapes and bruises. The two bullet wounds were connected by a tract. He was treated and released from the hospital with instructions to take Tylenol for pain. He testified at trial that he missed two days of work and he experienced pain for about one month. The bullet wounds took about a month and a half to heal, and he had a scar.

Licea declined medical attention at the crime scene. A responding deputy testified at trial that Licea had the following injuries: (1) a scrape that was one inch in diameter on his right elbow; (2) a six inch by four inch area of scratches on his upper left shoulder; and (3) a cut to knuckles on his right hand. None of Licea's injuries appeared life threatening and he did not complain of any pain.

IV. Appellant's Recorded Statements In Jail To A CPS Worker.

Approximately three days after his arrest, a CPS worker, Stephanie Meek, interviewed appellant while he was in jail. The conversation occurred over a jailhouse

telephone and it was recorded. A redacted recording was played for the jury at trial.[5]

The conversation started with Meek obtaining background information regarding appellant, his children, and the whereabouts of the children's mother.[6] Later in the conversation, appellant mentioned that he lived next to an abandoned house, and he had observed people come out of it, which he thought was weird. He expressed concern that these people might try to break into his house, and he had already caught someone trying to break in. Appellant stated, "That's originally when I got the gun." Appellant had possessed the gun for about 18 months and he kept it in a safe locked with a key. He claimed only he could access the gun, and he denied that his children knew about it.

Meek and appellant discussed who could legally care for his children. Their mother was "nowhere to be found." Appellant requested that his children should go to his mother, which Meek said she would explore.

Turning to the incident, Meek asked appellant why he grabbed a gun. He indicated that his daughter "was getting stampede[d] like my friend." He denied ever thinking he would shoot someone and he stated "nobody has the right to take nobody's life. Nobody. I really did think they were going to be afraid. I really did think that when people saw that I had a gun they were going to scatter but just everything stopped, instead I ended up getting hit[.]" Appellant denied knowing what happened or how the gun discharged. He denied having his finger on the trigger at any time. He surmised that "they" picked up the gun after he was hit. The interview concluded with Meek

---

5 Appellant had approximately six other conversations in jail which were recorded and played for the jury at trial. Because these other recorded conversations are not material to the present appeal, their factual summaries are omitted from this opinion.

6 Appellant had four children with Debbie Salcido, who was not involved in the children's lives, and he had six children with Navarro.

explaining what she would try to do for appellant's children and a general timeline of what would happen in their placement.

DISCUSSION

I. The Trial Court Did Not Err In Denying Appellant's Motion And Any Presumed Error Was Harmless.

Appellant argues that the admission of his recorded interview with Meek prejudicially violated various constitutional rights, requiring a new trial.

A. Background.

Prior to the presentation of evidence, appellant filed a motion in limine seeking to exclude his statements to Meek. Appellant's motion generally asserted that he was not advised of his rights under *Miranda v. Arizona* (1966) 384 U.S. 436 (*Miranda*) and its progeny, which were required under the circumstances, and he was denied the right to counsel.[7] In a response brief, appellant also noted that he had been placed in an "untenable position of either asserting his privilege against self-incrimination, or speaking to the CPS worker regarding the welfare of his children."

At oral argument, defense counsel suggested that appellant would not have known to assert his privilege against self-incrimination because he was never advised of that right. Defense counsel called it "an untenable situation," later noting that appellant may not have had the ability to refuse to speak to Meek. Defense counsel asserted that a balancing was required of the policy interests between placing appellant's children appropriately and at the same time protecting his constitutional rights.

The trial court ruled that appellant's statements to Meek were voluntary and not compelled. The court noted that appellant may have been motivated to cooperate with

---

[7] In the present appeal, appellant does not renew his claim that he was denied a right to counsel.

CPS, but he was under no compulsion to participate in that conversation. The court determined that appellant's custody "was only incidental" and the court denied appellant's motion.

B. Standard of review.

On appellate review, we independently determine whether a challenged statement was obtained in violation of *Miranda*. (*People v. Gurule* (2002) 28 Cal.4th 557, 601.) Likewise, we independently examine and resolve a pure question of law. (*People v. Waidla* (2000) 22 Cal.4th 690, 730.)

C. Analysis.

Appellant contends, in part, that the admission of his interview with Meek violated *Miranda*. We disagree.

As an initial matter, the parties dispute whether Meek was a state agent for purposes of *Miranda*. Appellant contends that Meek was an investigator for the Department of Social Services, which made her a peace officer. (See § 830.3, subd. (h) [definition of "peace officers" includes investigators of Social Services].) In contrast, relying on out-of-state authority, respondent argues that Meek was not acting as an agent for purposes of *Miranda* because she was not acting on behalf of law enforcement during the interview. (See *Wilkerson v. State of Texas* (2005) 173 S.W.3d 521, 533 [holding a CPS worker was not an agent of law enforcement for the purposes of *Miranda* under its facts].)

We note that respondent's out-of-state opinion is not binding on California courts. (*Arteaga v. Superior Court* (2015) 233 Cal.App.4th 851, 868.) For our analysis, we will presume, without so deciding, that Meek was a state agent for purposes of *Miranda* when she interviewed appellant. With that presumption in mind, however, Meek was not

required to give *Miranda* warnings to appellant because he did not undergo a custodial interrogation.

1. Appellant did not undergo a custodial interrogation.

In *Miranda*, the high court held that "the Fifth Amendment privilege against self-incrimination prohibits admitting statements given by a suspect during 'custodial interrogation' without a prior warning." (*Illinois v. Perkins* (1990) 496 U.S. 292, 296, quoting *Miranda, supra,* 384 U.S. at p. 444.) Custodial interrogation occurs when a person is taken into custody and law enforcement officers initiate questioning. (*Illinois v. Perkins, supra,* 496 U.S. at p. 296, quoting *Miranda, supra,* at p. 444.) *Miranda*'s protections preserve the privilege against self-incrimination during interrogations "'in a police-dominated atmosphere.' [Citation.]" (*Illinois v. Perkins, supra,* 496 U.S. at p. 296.) In the absence of *Miranda* warnings, statements made by a custodial defendant are inadmissible in the prosecution's case-in-chief. (*People v. Gurule, supra,* 28 Cal.4th at p. 601.)

Under *Miranda*, "custody" is a term of art that refers to circumstances that traditionally present a serious danger of coercion. (*Howes v. Fields* (2012) 565 U.S. 499, 508-509 (*Howes*).) To determine if a person is in custody for purposes of *Miranda*, the first step is to determine if a reasonable person would have felt free to end the interrogation and leave. (*Howes*, at p. 509.) The relevant factors in making this determination are (1) the location of the questioning; (2) its duration; (3) the statements made during the interview; (4) the presence or absence of physical restraints; and (5) the release of the interviewee at the end of questioning. (*Ibid*.) We find *Howes* instructive.

In *Howes, supra,* 565 U.S. 499, the defendant was serving a prison sentence when two sheriff's deputies questioned him about allegations he had engaged in sexual conduct with a 12-year-old boy. (*Id.* at p. 502.) The deputies interviewed the defendant between

five and seven hours in a prison conference room. (*Id.* at pp. 502-503.) At the start of the interview, the deputies told the defendant that he was free to leave and return to his cell. He was later again told that he could leave whenever he wanted. (*Id.* at p. 503.) The deputies were armed during the interview, but the defendant remained free of handcuffs or other restraints. The door to the conference room was sometimes open and sometimes shut. (*Ibid.*)

About halfway through the interview, the defendant became agitated and started to yell. According to the defendant, a deputy told him, using an expletive, to sit down, but also said the defendant could leave if he did not want to cooperate. The defendant eventually confessed to sex acts with the boy. According to the defendant, he said several times during the interview that he no longer wanted to talk to the deputies, but he never asked to go back to his cell prior to the interview's termination. (*Howes, supra,* 565 U.S. at p. 503.) When he was ready to leave, the defendant had to wait another 20 minutes or so because a correctional officer had to escort him back to his cell. (*Id.* at pp. 503-504.) At no time did the deputies give *Miranda* warnings or advise him that he did not have to speak with them. (*Id.* at p. 504.)

On appeal, the *Howes* court declined to adopt a categorical rule regarding whether the questioning of a prison inmate is custodial. (*Howes, supra,* 565 U.S. at p. 505.) Instead, "[w]hen a prisoner is questioned, the determination of custody should focus on all of the features of the interrogation. These include the language that is used in summoning the prisoner to the interview and the manner in which the interrogation is conducted. [Citation.] An inmate who is removed from the general prison population for questioning and is 'thereafter … subjected to treatment' in connection with the interrogation 'that renders him "in custody" for practical purposes … will be entitled to

the full panoply of protections prescribed by *Miranda*.' [Citation.]" (*Howes, supra,* 565 U.S. at p. 514.)

Howes determined that the defendant was not taken into custody for purposes of *Miranda* even though the defendant did not invite the interview, he did not consent to it in advance, and he was not advised that he was free to decline to speak with the deputies. (*Howes, supra,* 565 U.S. at pp. 514-515.) The high court found unpersuasive the concerns that the interview lasted between five and seven hours in the evening, it continued well past the time the defendant generally went to bed, the deputies were armed, and one of the deputies, according to the defendant, used "a very sharp tone," and, on one occasion, profanity. (*Id.* at p. 515.) In contrast to these circumstances, the deputies told the defendant that he could go back to his cell whenever he wanted. The deputies neither restrained the defendant nor threatened him. The interview occurred in a well-lit, average-sized conference room. The defendant "was 'not uncomfortable.'" (*Ibid.*) He was offered food and water, and the door to the conference room was sometimes left open. "'All of these objective facts are consistent with an interrogation environment in which a reasonable person would have felt free to terminate the interview and leave.' [Citation.]" (*Ibid.*) Under all of the circumstances of the questioning, *Howes* concluded that the defendant was not in custody within the meaning of *Miranda.* (*Howes,* at p. 517.)

Here, appellant's interview occurred over a jailhouse telephone, and nothing indicates that the location of appellant's interview was unusual or harsh. There is no evidence that Meek was armed and, even if she was, it is reasonable to infer that she was separated from appellant by glass. Appellant's interview with Meek was not long and lasted a matter of minutes, not hours. The unredacted transcript of the interview covers a mere 24 pages in the record.

Although Meek never informed appellant that he was free to leave, she also never stated or suggested to him that he had to answer her questions. Similar to *Howes*, there is no evidence that appellant was physically restrained. There is no evidence that appellant was threatened. At no time did Meek act aggressively with appellant. To the contrary, Meek conducted the interview in a professional and courteous matter. Nothing in this record indicates that appellant was uncomfortable. Nothing supports appellant's contention that he was "suffering the shock of arrest" that occurred three days before.

Similar to *Howes*, the objective factors of appellant's interview are consistent with an environment in which a reasonable person would have felt free to terminate the interview and leave. Nothing in this record indicates that a police-dominated atmosphere existed. Nothing establishes the circumstances which the *Miranda* protections were designed to prevent, i.e., a serious danger of coercion.

Although appellant may have been motivated to cooperate with Meek, in light of the objective circumstances of the interview, a custodial interrogation did not occur. As such, even assuming Meek was a state agent for purposes of *Miranda*, she was not required to give appellant *Miranda* warnings. Appellant's statements were not obtained in violation of the Fifth Amendment privilege against self-incrimination as developed in *Miranda* and its progeny. Accordingly, the trial court did not err.

2. Appellant was not forced to choose between competing rights.

In addition to his arguments pursuant to *Miranda*, appellant contends his interview with Meek forced him to choose between competing constitutional rights. On the one hand, he points to his liberty interest in the care, custody and management of his children. (See *Troxel v. Granville* (2000) 530 U.S. 57, 65 ["the interest of parents in the care, custody, and control of their children—is perhaps the oldest of the fundamental liberty interests recognized by this Court"].) On the other hand, he points to his broad privilege

against self-incrimination (U.S. Const., 5th Amend.). He argues he had to speak or lose any meaningful participation in the care of his children.

To support this claim, appellant relies primarily on *Simmons v. United States* (1968) 390 U.S. 377 (*Simmons*) (and its progeny) and *In re Jessica B.* (1989) 207 Cal.App.3d 504 (*Jessica B.*). These opinions generally involve a criminal defendant who was forced to choose between two competing constitutional rights. For instance, in *Simmons, supra,* 390 U.S. 377, the high court reversed a defendant's criminal conviction when his testimony at a suppression hearing was used against him at trial. (*Id.* at pp. 380-381, 394.) The *Simmons* court found it "intolerable" that the defendant had to choose between his Fourth Amendment right to suppress evidence and his Fifth Amendment privilege against self-incrimination. (*Id.* at p. 394.)

Somewhat similarly, in *Jessica B., supra,* 207 Cal.App.3d 504, this court affirmed a juvenile court's order that granted a father limited supervised visitation with his child. (*Id.* at pp. 511, 521.) The juvenile court had refused to permit the father to return home unless he, in part, admitted that he had intentionally abused his child. The *Jessica B.* court determined that the father faced a dilemma because, without immunity, he was forced to choose between incriminating himself or having little chance of complete reunification. (*Id.* at p. 520.) *Jessica B.* held that use immunity was required during the dependency proceedings, including during any court-ordered therapy sessions. (*Id.* at p. 521.) *Jessica B.* affirmed the juvenile court's order because, with the imposed immunity, the father's privilege against self-incrimination was not violated. (*Ibid*.)

Appellant argues that his situation "is essentially on all fours" with *Jessica B.*, and he contends its "conclusion" should control here. He further asserts that he was "effectively in the same position as the defendant in *Simmons*" because he was

"compelled" to answer Meek's questions or forgo management of his children. We find appellant's contentions unpersuasive.

3. Appellant did not forfeit his alternative constitutional claim.

As an initial matter, the parties dispute whether appellant has forfeited this claim. The parties also dispute whether appellant received ineffective assistance of counsel if this issue is deemed forfeited. We decline to find forfeiture.

Our Supreme Court has noted that "'no useful purpose is served by declining to consider on appeal a claim that merely restates, under alternative legal principles, a claim otherwise identical to one that was properly preserved by a timely motion that called upon the trial court to consider the same facts and to apply a legal standard similar to that which would also determine the claim raised on appeal.' [Citations.]" (*People v. Cole* (2004) 33 Cal.4th 1158, 1195, fn. 6.)

Here, appellant filed a timely motion objecting to the introduction of his CPS interview under *Miranda*. As respondent concedes, appellant's defense counsel also argued below that appellant was in an "untenable situation" during the CPS interview and policy reasons supported exclusion of the interview. Specifically, defense counsel noted that appellant may not have had the right to refuse to talk to the CPS worker. Defense counsel argued that a balancing was required to ensure the children were placed appropriately while also protecting appellant's constitutional rights.

We reject respondent's arguments that the present constitutional claim, which involved the same facts as his claim under *Miranda*, was forfeited. No useful purpose is served by declining to consider this claim on appeal because it merely restates, under alternative legal principles, a claim that was properly preserved below. As such, we will consider the merits of this claim. However, we reject appellant's contentions because he was not compelled to speak for purposes of the Fifth Amendment.

4. Appellant was not compelled to speak.

The privilege against self-incrimination is protected in "inherently coercive" circumstances "by the requirement that a suspect not be subjected to *custodial* interrogation unless he or she knowingly and intelligently has waived the right to remain silent, to the presence of an attorney, and, if indigent, to appointed counsel." (*People v. Storm* (2002) 28 Cal.4th 1007, 1021.) "'By definition, "a necessary element of compulsory self-incrimination is some kind of compulsion."' [Citation.] The 'sole' form of compulsion targeted by the Fifth Amendment privilege is 'governmental coercion'—not '"moral and psychological pressures … emanating from sources other than official coercion"' or the absence of '"free choice" in any broader sense of the word.' [Citation.]" (*People v. Tom* (2014) 59 Cal.4th 1210, 1223; see also *Minnesota v. Murphy* (1984) 465 U.S. 420, 427 [the Fifth Amendment speaks of compulsion and does not preclude a witness from testifying voluntarily].)

Further, a witness is not considered "compelled" to testify in the absence of claiming a privilege against self-incrimination. (*Minnesota v. Murphy, supra,* 465 U.S. at p. 427.) If a witness makes disclosures instead of claiming the privilege, the government has not compelled a witness to incriminate himself. (*Ibid.*) The high court has long "recognized that '[the] Constitution does not forbid the asking of criminative questions,' [citation], and nothing in our prior cases suggests that the incriminating nature of a question, by itself, excuses a timely assertion of the privilege. [Citation.]" (*Id.* at p. 428.)

Here, Meek never threatened appellant and she made no promises to him. Instead, she made it clear that she would do what she could to assist him in placing his children. In the unredacted portion of the interview, Meek told appellant that she did not "have anything to do with the criminal side of things. I'm just trying to figure out what's going to be in the best interest of your kids." This record does not establish that appellant was

subjected to governmental coercion, which is the only form of compulsion which the Fifth Amendment privilege targets. (*People v. Tom, supra*, 59 Cal.4th at p. 1223.)

Further, appellant never stated or implied that he did not want to answer Meek's questions. The Fifth Amendment does not preclude a witness from testifying voluntarily in matters that may incriminate him or her. Because appellant never hinted that he was reluctant to speak, he was not "compelled" within the meaning of the Fifth Amendment. (*Minnesota v. Murphy*, *supra*, 465 U.S. at p. 427.)

Finally, we have already determined that appellant was not in custody for purposes of *Miranda*. Because he was not in custody, he did not undergo a custodial interrogation. This record does not establish that an inherently coercive environment existed.

Based on this record, appellant was not compelled to speak for purposes of the Fifth Amendment privilege against self-incrimination. As such, we reject his contention that he was forced to choose between competing constitutional rights. Accordingly, appellant cannot establish a constitutional violation and this claim fails.

5. Any presumed error was harmless.

A federal constitutional error is harmless under *Chapman v. California* (1967) 386 U.S. 18, 24 (*Chapman*), when the reviewing court determines beyond a reasonable doubt that the error did not contribute to the verdict. (*People v. Aranda* (2012) 55 Cal.4th 342, 367.) "To say that an error did not 'contribute' to the ensuing verdict is not, of course, to say that the jury was totally unaware of that feature of the trial later held to have been erroneous." (*Yates v. Evatt* (1991) 500 U.S. 391, 403, disapproved on other grounds in *Estelle v. McGuire* (1991) 502 U.S. 62, 72, fn. 4.) Rather, an error did not contribute to the verdict when the record reveals the error was unimportant in relation to everything else the jury considered on the issue in question. (*Yates v. Evatt* at p. 403.)

Appellant argues that the admission of his CPS interview was prejudicial. He principally claims that this evidence undermined his defense. He contends that the jury could have concluded that he was lying and it could have determined that he used the gun in an offensive manner. We find appellant's contentions unpersuasive. Assuming it was error to admit the interview, any presumed error was harmless.

During the interview, Meek asked appellant about his prior drug and alcohol use, and appellant admitted that he used medical marijuana daily. Further, she raised concerns with appellant that his residence was described as "extremely dirty" and his children were described as "very dirty" when law enforcement arrived. However, those portions of the interview were redacted and were not played for the jury. As such, we reject appellant's claim that his interview with Meek was prejudicial because it depicted him as a drug user, who was unable to maintain a clean household.

The jury found appellant not guilty of attempted murder. Based on the verdict rendered, it is apparent the jury determined either that appellant did not act with an intent to kill, or he fired in the heat of passion, or he fired in imperfect defense of Licea. When Meek asked why he would grab a gun, appellant indicated that his daughter "was getting stampede[d] like my friend." He indicated he hoped the gun would scare off the assailants and was surprised when that did not happen. However, he also emphasized that he did not intend to shoot anyone and he believed nobody has the right to take another person's life. As such, we reject appellant's claims that the jury might have prejudicially viewed the CPS interview as suggesting he used the gun in an offensive manner. To the contrary, this interview suggested his lack of intent to kill. It also suggested he used the gun to protect Licea and/or M.A.

Moreover, a responding sheriff's deputy testified that appellant claimed to have been inside his home when he heard screaming. Appellant denied hearing any shots and

he denied knowing who had fired a gun. In light of the deputy's testimony, the jury had other evidence that established appellant's initial denial about firing the gun.

Although the evidence suggested multiple men were striking Licea, who may have been in a chokehold, Licea's assailants did not use weapons. A responding deputy testified at trial that Licea had scrapes and scratches to minor areas of his body. None of Licea's injuries appeared life threatening and he did not complain of any pain. Licea declined medical attention at the crime scene. Based on the trial evidence, it is questionable whether it was reasonable for appellant to discharge a potentially fatal shot at Juan Carlos.

Finally, the prosecutor's closing arguments span approximately 29 pages in the record, and his rebuttal arguments span another approximate 46 pages. During his relatively lengthy summations, the prosecutor twice briefly mentioned the CPS interview: (1) to emphasize that appellant should have known it was dangerous to fire a gun with a crowd of people around; and (2) to emphasize that appellant told Meek he believed nobody had the right to take another person's life.

At no time did the prosecutor use the CPS interview to discredit appellant's defense. To the contrary, the prosecutor argued that if appellant actually believed he was justified in firing the gun, he would not have hid the gun. Further, the prosecutor emphasized that appellant told the responding deputy that he was inside when the incident happened, he did not know what occurred, and his daughter was already shot when he went outside. The prosecutor noted that this behavior belied appellant's belief that he was justified in shooting.

Based on this record, it is beyond a reasonable doubt that the introduction of appellant's statements to Meek was harmless. The CPS interview did not contribute to the verdicts rendered. Its introduction was unimportant in relation to everything else the

jury considered in determining appellant's guilt. Accordingly, appellant cannot establish prejudice and this claim fails.

II. Sufficient Evidence Supports The Jury's Finding Of Great Bodily Injury.

Appellant asserts that there was insufficient evidence to support a finding that he inflicted great bodily injury on Juan Carlos.

A. Standard of review.

It is a question of fact for the jury to determine whether a victim suffered great bodily injury. (*People v. Escobar* (1992) 3 Cal.4th 740, 750.) This is not a question of law. (*People v. Cross* (2008) 45 Cal.4th 58, 64.) On appeal, if sufficient evidence exists to sustain the jury's finding, the appellate court must accept it even if the circumstances might reasonably point to a contrary finding. (*People v. Escobar, supra,* 3 Cal.4th at p. 750.)

B. Analysis.

Appellant argues no evidence shows that Juan Carlos suffered bone fractures, had a loss of body function, needed extensive suturing, or had any serious disfigurement. He contends Juan Carlos likely did not have severe pain because the treating physician only prescribed him Tylenol. He asserts the evidence is insufficient to support the jury's true finding as to the infliction of great bodily injury as to Juan Carlos. We disagree.

Section 12022.7 imposes a sentence enhancement on a person who inflicts "great bodily injury" in the commission of an attempted felony that does not include bodily harm as an element. (§ 12022.7, subd. (a).) Section 12022.7 defines "great bodily injury" as "a significant or substantial physical injury" beyond what is inherent to the underlying offense. (§ 12022.7, subd. (f).) The term "great bodily injury" has been used in California for over a century and courts have held it is not a technical term so that the jury can use its own common understanding in applying its application. (*People v. La*

Fargue (1983) 147 Cal.App.3d 878, 886-887.) "'"A fine line can divide an injury from being significant or substantial from an injury that does not quite meet the description."' [Citations.] Where to draw that line is for the jury to decide." (*People v. Cross, supra,* 45 Cal.4th at p. 64.)

Case law establishes that some physical pain or damage, such as lacerations, bruises, or abrasions, is sufficient to find great bodily injury. (*People v. Washington* (2012) 210 Cal.App.4th 1042, 1047; *People v. Jung* (1999) 71 Cal.App.4th 1036, 1042.) Gunshot wounds, even without significant lasting injuries, have been found sufficient to support a great bodily injury enhancement.

In *People v. Miller* (1977) 18 Cal.3d 873 (*Miller*) the victim was injured multiple times, including a gunshot which pierced his arm near the elbow. *Miller* determined that the jury could reasonably determine the bullet piercing the victim's arm was sufficient to constitute a great bodily injury. (*Id.* at p. 883.)

In *People v. Lopez* (1986) 176 Cal.App.3d 460 (*Lopez*), the defendant shot two victims, one in the right hip cheek and the other through the thigh. There was no evidence either victim sought medical treatment or experienced more than momentary distress. (*Id.* at p. 463 & fn. 5.) *Lopez* found the injuries sufficient to support great bodily injury enhancements, noting the penetrating wounds could not be called superficial and the victims felt pain. *Lopez* determined the bullet wounds were no less "transitory or short-lived" (*id.* at p. 465) as the gunshot wound suffered by the victim in *Miller*. Accordingly, *Lopez* upheld the jury's findings of great bodily injuries.

Here, Juan Carlos suffered a penetrating wound from two bullet holes. His wound took more than a month to heal and he had a scar. He testified that he experienced ongoing pain for about a month. Based on this record, the jury could have reasonably determined that his gunshot wounds qualified as a great bodily injury. Sufficient

evidence exists to sustain the jury's finding. As such, we will not disturb the jury's finding on appeal even though the circumstances might reasonably point to a contrary finding. Accordingly, this claim fails.

III. The Trial Court Was Not Required To Instruct With CALCRIM No. 306.

Appellant argues that the trial court erred by not instructing the jury with CALCRIM No. 306, which discusses the effect of a party's late disclosure of evidence. He contends this failure was prejudicial, requiring reversal of all convictions.

A. Background.

1. Relevant motion in limine.

Prior to trial, appellant filed certain motions in limine, including a request to exclude all references to a statement made by Fernando's girlfriend, Arevalo, that appellant and his family had previously assaulted someone. The motion, listed as No. 9 in a series of such motions, made the following relevant statements:

> "In his report, Deputy Perkins noted the following: 'Arevalo said she is afraid of retaliation towards her family. Arevalo said this is not the first time [appellant] and his family assaulted someone in front of their residence.' ….
>
> "The defense has no information (date, time, reports, etc.) that [appellant] or his family were engaged in any confrontation prior to the charged incident. Ms. Arevalo's statement has no foundation, involves inadmissible hearsay, and is prejudicial.
>
> "Further, the statement has no relevance to the charged offenses and involves improper character evidence.
>
> "[Appellant] also objects on grounds that admission of said matters would violate his right to due process and a fair trial under the United States and California Constitutions."

At oral arguments, the prosecutor denied that it would present this evidence in its case-in-chief, but noted it was "rebuttal character evidence." The trial court tentatively

granted this motion. The court noted that the prosecution would have to seek reconsideration in the event it wanted this evidence to come in for rebuttal or any other purpose.

2. Arevalo's trial testimony regarding appellant's past incident of violence.

During trial, the prosecutor asked Arevalo how long she had lived in the same neighborhood with appellant. The prosecutor asked Arevalo if she knew whether appellant had a reputation in the neighborhood for being violent or peaceful. After she answered in the affirmative, the prosecutor asked how she was aware of that reputation. Arevalo said she had "seen an incident happen." The following exchange occurred.

> "[PROSECUTOR]: Okay. I don't want to ask you about the incident you saw just yet, but have you heard—aside from that incident you saw, have you heard any talk about [appellant] in the neighborhood?
>
> "[AREVALO]: No.
>
> "[PROSECUTOR]: Okay. You mentioned you saw an incident?
>
> "[DEFENSE COUNSEL]: May I ask for discovery, Your Honor?"

The judge excused the jury for a recess. The following exchange occurred.

> "THE COURT: [¶] … [¶] [Defense counsel], I take it from your objection that you believe you're about to hear something that had not been provided to you in discovery?
>
> "[DEFENSE COUNSEL]: Yes. Two things: For one, they never provided in discovery, and for another, I did have motions in limine regarding a statement that [Arevalo] made to the officer where she said that this was not the first time [appellant] and his family assaulted someone in front of their residence.
>
> "THE COURT: All right. I can reconsider that, because it seems to me, the character has changed, now it's clear, after opening statements, that [appellant's] character, as well as the victim's character, are gonna [*sic*] be in evidence, but—

"[DEFENSE COUNSEL]: That's fine, Your Honor.

"THE COURT: Let me get an offer of proof. [¶] [Prosecutor], what do you expect she's gonna [*sic*] tell us about?

"[PROSECUTOR]: Your Honor, I know as much as defense counsel, but I know that she told the deputy this wasn't the first time that [appellant] and his family got—assaulted someone in front of their house. [¶] Based on that, I believe that it's evidence of a prior violent incident by [appellant].

"THE COURT: You haven't followed up with her to get any of the details on that?

"[PROSECUTOR]: I have not, Your Honor.

"THE COURT: I am gonna [*sic*] sustain the discovery objection at this time without prejudice. Before that evidence comes in, I'm gonna [*sic*] direct you to ascertain from her what she's gonna [*sic*] testify to and that you provide that information to counsel."

Instead of having an investigator speak with Arevalo, the prosecutor asked for a hearing pursuant to Evidence Code section 402. The trial court agreed, and Arevalo was called back to testify outside the jury's presence. During the section 402 hearing, Arevalo described an incident in 2014 wherein appellant and members of his family fought with a male in front of appellant's house. On cross-examination, Arevalo confirmed that she told the deputy about this prior incident.

At the conclusion of the Evidence Code section 402 hearing, the trial court ordered the jury back into the courtroom and Arevalo continued her trial testimony. The prosecutor continued his questioning of her. No further mention was made of defense counsel's previous objection. Upon resuming trial testimony, the prosecutor asked Arevalo about the prior incident in front of appellant's house. She recounted this incident to the jury. Defense counsel lodged no further objections to this testimony before cross-examining Arevalo.

During jury instructions, the trial court did not instruct the jury with CALCRIM No. 306, and defense counsel made no request for it.

B. Standard of review.

"'It is settled that in criminal cases, even in the absence of a request, the trial court must instruct on the general principles of law relevant to the issues raised by the evidence. [Citations.] The general principles of law governing the case are those principles closely and openly connected with the facts before the court, and which are necessary for the jury's understanding of the case.' [Citations.]" (*People v. Diaz* (2015) 60 Cal.4th 1176, 1189.) We review de novo a claim that a trial court failed to give a required jury instruction. (*People v. Waidla, supra,* 22 Cal.4th at p. 733.)

C. Analysis.

As an initial matter, the parties dispute whether appellant has forfeited this issue. Respondent contends a timely request is necessary for a remedial jury instruction pursuant to section 1054.5. In contrast, appellant generally contends that the trial court had an independent duty to provide this instruction. Because appellant presents this claim as the trial court's failure to instruct sua sponte, we will presume, without so deciding, that no forfeiture occurred. In any event, we reject appellant's claim on its merits.

1. The law regarding pretrial disclosure.

Pursuant to section 1054.1, a prosecuting attorney must disclose to the defense evidence and information in the possession of the prosecuting attorney or known to be in the possession of an investigating agency. Such information includes any relevant written or recorded statements of witnesses. (§ 1054.1, subds. (a)-(f).) Disclosures must "be made at least 30 days prior to the trial, unless good cause is shown why a disclosure should be denied, restricted, or deferred." (§ 1054.7.)

"Upon a showing both that the defense complied with the informal discovery procedures provided by the statute, and that the prosecutor has not complied with section 1054.1, a trial court 'may make any order necessary to enforce the provisions' of the statute, 'including, but not limited to, immediate disclosure, … continuance of the matter, or any other lawful order.' (§ 1054.5, subd. (b).)" (*People v. Verdugo* (2010) 50 Cal.4th 263, 280.) Citing section 1054.5, subdivision (b), our Supreme Court has noted that a trial court "may also 'advise the jury of any failure or refusal to disclose and of any untimely disclosure.' [Citation.]" (*People v. Verdugo, supra,* 50 Cal.4th at p. 280.)

2. CALCRIM No. 306.

CALCRIM No. 306 instructs the jury as follows for the untimely disclosure of evidence:

> "Both the People and the defense must disclose their evidence to the other side before trial, within the time limits set by law. Failure to follow this rule may deny the other side the chance to produce all relevant evidence, to counter opposing evidence, or to receive a fair trial.
>
> "An attorney for the (People/defense) failed to disclose: _____ <*describe evidence that was not disclosed*> [within the legal time period].
>
> "In evaluating the weight and significance of that evidence, you may consider the effect, if any, of that late disclosure.
>
> "[However, the fact that the defendant's attorney failed to disclose evidence [within the legal time period] is not evidence that the defendant committed a crime.]
>
> "<*Consider for multiple defendant cases*>
>
> "[You must not consider the fact that an attorney for defendant _____ <*insert defendant's name*> failed to disclose evidence when you decide the charges against defendant[s] _____ <*insert names of other defendant[s]*>.]"

Here, defense counsel filed a motion in limine regarding Arevalo's statements. Based on the defense motion to exclude this evidence, it is clear the defense was aware of Arevalo's statements to law enforcement regarding a prior incident wherein appellant and his family allegedly assaulted someone. The prosecutor informed the court that he knew "as much as defense counsel" about this issue. The prosecutor denied that he ever followed up with Arevalo to get details on this topic. This record does not establish that the prosecutor provided untimely discovery or failed to provide known information. To the contrary, the defense had this information before trial and the defense could have attempted to contact Arevalo regarding her statements. As such, the trial court was not required to instruct the jury with CALCRIM No. 306 as appellant now claims.

Further, even if this record could be construed as establishing a violation of section 1054.1, a position we do not take, we still reject appellant's contention that the trial court had a sua sponte obligation to instruct the jury with CALCRIM No. 306. A trial court has authority to make any necessary orders to enforce the discovery provisions, "including, but not limited to, immediate disclosure, … continuance of the matter, or any other lawful order." (§ 1054.5, subd. (b).) Section 1054.5, subdivision (b), expressly gives a trial court discretion whether to give an instruction on untimely disclosure. Indeed, citing section 1054.5, subdivision (b), our Supreme Court has noted that a trial court "*may* also 'advise the jury of any failure or refusal to disclose and of any untimely disclosure.' [Citation.]" (*People v. Verdugo, supra,* 50 Cal.4th at p. 280, emphasis added.)

Based on this record and the applicable statutory language, we reject appellant's claim that the trial court had a sua sponte duty to instruct the jury with CALRIM No. 306.

Accordingly, the trial court did not err and this claim fails.[8]

IV. Instructional Error Did Not Occur Regarding Defense Of Another And Any Presumed Error Was Harmless.

Appellant asserts that the trial court committed reversible error based on its jury instruction regarding defense of another under CALCRIM No. 505. The instruction as given informed the jury that defense of another is a defense to attempted murder. Appellant claims that the jury was not instructed that this defense also applies to attempted voluntary manslaughter. He seeks reversal of his conviction in count 1.

A. Background.

1. Relevant jury instructions.

The trial court provided the following relevant jury instructions.

a. CALCRIM No. 600.

With CALCRIM No. 600, the court instructed the jury regarding the charge of attempted murder in count 1. For appellant to be guilty of this charge, the jury was told, in relevant part, that the prosecution had to prove that (1) appellant "took at least one direct but ineffective step toward killing another person;" and (2) appellant "intended to kill that person."

b. CALCRIM No. 505.

With CALCRIM No. 505, the jury was instructed regarding the doctrine of defense of another. The court stated the following:

> "[Appellant] is not guilty of attempted murder if he was justified in attempting to kill someone in defense of another.
>
> "[Appellant] acted in lawful defense of another if:

---

[8] Because the trial court did not err, we will not address appellant's arguments regarding prejudice.

"One, [appellant] reasonably believed that Jose Licea was in imminent danger of being killed or suffering great bodily injury; two, [appellant] reasonably believed that the immediate use of deadly force was necessary to defend against that danger; and three, [appellant] used no more force than was reasonably necessary to defend against that danger.

"Belief in future harm is not sufficient, no matter how great or how likely the harm is believed to be. [Appellant] must have believed there was imminent danger of death or great bodily injury to someone else. [Appellant's] belief must have been reasonable, and he or she [*sic*] must have acted only because of that belief.

"[Appellant] is only entitled to use that amount of force that a reasonable person would believe is necessary in the same situation. If [appellant] used more force than was reasonable, the attempted killing was not justified.

"When deciding whether [appellant's] beliefs were reasonable, consider all the circumstances as they were known to and appeared to [appellant] and consider what a reasonable person in a similar situation with similar knowledge would have believed. If [appellant's] beliefs were reasonable, the danger does not need to have actually existed.

"[Appellant's] belief that someone else was threatened may be reasonable, even if he or she [*sic*] relied on information that was not true. However, [appellant] must actually and reasonably have believed that the information was true.

"[¶] … [¶]

"The People have the burden of proving beyond a reasonable doubt that the attempted killing was not justified. If the People have not met this burden, you must find [appellant] not guilty of attempted murder."

c. CALCRIM No. 3517.

With CALCRIM No. 3517, the jury was told, in part, that attempted voluntary manslaughter is a lesser crime of attempted murder.

d. CALCRIM No. 603.

With CALCRIM No. 603, the jury received instruction regarding attempted voluntary manslaughter based on a sudden quarrel or while in the heat of passion. The jurors were told, in relevant part, that attempted murder is reduced to attempted voluntary manslaughter if appellant attempted to kill someone because of a sudden quarrel or while in the heat of passion. After explaining the required elements, the jury was told that the prosecution had the burden of proving beyond a reasonable doubt that appellant attempted to kill someone and he was not acting as a result of a sudden quarrel or in the heat of passion.

e. CALCRIM No. 604.

With CALCRIM No. 604, the court instructed the jury as follows:

> "An attempted killing that would otherwise be attempted murder is reduced to attempted voluntary manslaughter if [appellant] attempted to kill a person because he acted in imperfect defense of another.
>
> "If you conclude that [appellant] acted in complete defense of another, his action was lawful, and you must find him not guilty of any crime.
>
> "The difference between complete defense of another and imperfect defense of another depends on whether [appellant's] belief in the need to use deadly force was reasonable.
>
> "[Appellant] acted in imperfect defense of another if:
>
> "One, [appellant] took at least one direct but ineffective step toward killing a person; two, [appellant] intended to kill when he acted; three, [appellant] believed that Jose Licea was in imminent danger of being killed or suffering great bodily injury; four, [appellant] believed that the immediate use of deadly force was necessary to defend against the danger; and five, at least one of [appellant's] beliefs was unreasonable.
>
> "[¶] … [¶]

> "The People have the burden of proving beyond a reasonable doubt that [appellant] was not acting in imperfect self-defense. If the People have not met this burden, you must find [appellant] not guilty of attempted murder."

B. Standard of review.

Alleged instructional errors are questions of law, which we review de novo. (*People v. Guiuan* (1998) 18 Cal.4th 558, 569-570; *People v. Jandres* (2014) 226 Cal.App.4th 340, 358.) We must ascertain the relevant law and determine whether the given instruction correctly stated it. (*People v. Kelly* (1992) 1 Cal.4th 495, 525-526.)

"When considering a claim of instructional error, we view the challenged instruction in the context of the instructions as a whole and the trial record to determine whether there is a reasonable likelihood the jury applied the instruction in an impermissible manner. [Citation.]" (*People v. Houston* (2012) 54 Cal.4th 1186, 1229.) In that context, we must then "determine whether it is reasonably likely the jurors understood the instruction[s] as [defendant] suggests. [Citation.] In making that determination, we must consider several factors including the language of the instruction[s] in question [citation], the record of the trial [citation], and the arguments of counsel." (*People v. Nem* (2003) 114 Cal.App.4th 160, 165.) We presume the jurors are "intelligent and capable of understanding and applying the court's instructions. [Citation.]" (*People v. Gonzales* (2011) 51 Cal.4th 894, 940.)

C. Analysis.

The opening sentence in the standard form instruction for CALCRIM No. 505 states: "The defendant is not guilty of (murder/ [or] manslaughter/ attempted murder/ [or] *attempted voluntary manslaughter*) if (he/she) was justified in (killing/attempting to kill) someone in (self-defense/ [or] defense of another)." Likewise, the final paragraph states: "The People have the burden of proving beyond a reasonable doubt that the [attempted] killing was not justified. If the People have not met this burden, you must

find the defendant not guilty of (murder/ [or] manslaughter/ attempted murder/ [or] *attempted voluntary manslaughter*)." (Emphasis added.)

Appellant argues that the trial court's modified instruction under CALCRIM No. 505 was in error because it failed to inform the jurors that defense of another applies to both attempted murder and attempted voluntary manslaughter. He further contends there were no instructions directing the jurors that, if they found imperfect defense of another, then appellant was not guilty of attempted manslaughter.[9] He argues the instructions given in CALCRIM Nos. 505 and 604 contradicted the other. We disagree.

1. The law regarding homicide.

The killing of one human being by another, homicide, is not always criminal. In some situations, a killing may be justifiable or excusable. (*People v. Elmore* (2014) 59 Cal.4th 121, 132.) The forms of criminal homicide are murder and manslaughter. Murder is the unlawful killing of a human being with malice aforethought, which may be express or implied. (*Ibid.*) Express malice is "'a deliberate intention unlawfully to take away the life of a fellow creature.' [Citation.]" (*Ibid.*) Implied malice occurs when "an unlawful killing results from a willful act, the natural and probable consequences of which are dangerous to human life, performed with conscious disregard for that danger. [Citations.]" (*Id.* at p. 133.) "Thus, the mens rea required for murder is malice, express or implied. [Citation.]" (*Ibid.*)

In contrast to murder, manslaughter, which is a lesser included offense of murder, "is an unlawful killing without malice. [Citations.]" (*People v. Elmore, supra,* 59 Cal.4th at p. 133.) There are three types of manslaughter: voluntary, involuntary, and vehicular. (*Ibid.*) "Two factors may preclude the formation of malice and reduce murder

---

9 We note that California law also refers to the doctrine of imperfect defense of others as an "unreasonable" defense of others. (*People v. Michaels* (2002) 28 Cal.4th 486, 529.)

to voluntary manslaughter: heat of passion and unreasonable self-defense. [Citations.] Heat of passion is recognized by statute as a mitigating factor. [Citation.] Unreasonable self-defense is founded on both statute and the common law. [Citation.]" (*Ibid.*)

2. The law regarding defense of another.

Under California law, the doctrine of "defense of another" is similar in its application to the doctrine of self-defense. (See CALCRIM No. 505 [a justifiable homicide may be based on either self-defense or defense of another].) A killing is not a crime when based on a reasonable belief that killing is necessary to avert an imminent threat of death or great bodily injury. (*People v. Elmore, supra,* 59 Cal.4th at pp. 133-134; accord *People v. Randle* (2005) 35 Cal.4th 987, 994, overruled on other grounds in *People v. Chun* (2009) 45 Cal.4th 1172, 1201.) In contrast, when that belief is unreasonable, a killing is not justifiable. (*People v. Elmore, supra,* 59 Cal.4th at p. 134; *People v. Randle, supra,* 35 Cal.4th at p. 994.) When someone holds an honest but unreasonable belief in the necessity to defend against imminent great bodily injury or death, malice is not present and no greater offense than manslaughter can be committed. (*People v. Elmore, supra,* 59 Cal.4th at p. 134.; accord *People v. Randle, supra,* 35 Cal.4th at p. 995; *People v. Blakeley* (2000) 23 Cal.4th 82, 91 [a person is liable for voluntary manslaughter if the person, with the intent to kill or with conscious disregard for life, unlawfully kills in unreasonable self-defense].)

Likewise, "one who, acting with conscious disregard for life, unintentionally kills in unreasonable self-defense is guilty of voluntary manslaughter rather than the less serious crime of involuntary manslaughter …." (*People v. Blakeley*, *supra*, 23 Cal.4th at p. 92; accord *People v. Whitmer* (2014) 59 Cal.4th 733, 742.) "Unreasonable self-defense is 'not a true defense; rather, it is a shorthand description of one form of voluntary manslaughter.' [Citation.]" (*People v. Elmore, supra,* 59 Cal.4th at p. 134.)

"And voluntary manslaughter, whether it arises from unreasonable self-defense or from a killing during a sudden quarrel or heat of passion, is not a defense but a crime; more precisely, it is a lesser offense included in the crime of murder." (*People v. Barton* (1995) 12 Cal.4th 186, 200-201.)

Here, the instruction under CALCRIM No. 505 correctly informed the jury that the doctrine of defense of another potentially exonerated appellant on the charge of attempted murder. The instruction under CALCRIM No. 604 correctly explained to the jurors that attempted murder is reduced to attempted voluntary manslaughter if appellant attempted to kill a person because he acted in imperfect defense of another. The trial court stated, "If you conclude that [appellant] acted in complete defense of another, his action was lawful, and you must find him not guilty of any crime." The court explained the difference between complete and imperfect defense of another, i.e., whether appellant's belief in the need to use deadly force was reasonable.

The court's instructions, when read as a whole, correctly stated the law in California. A killing or attempted killing is not a crime when based on a reasonable belief that killing is necessary to avert an imminent threat of death or great bodily injury. (*People v. Elmore, supra,* 59 Cal.4th at pp. 133-134.) In contrast, when that belief is unreasonable, a killing is not justifiable. (*Id.* at p. 134.) A person is liable for voluntary manslaughter if the person, with the intent to kill or with conscious disregard for life, unlawfully kills in unreasonable self-defense. (*Ibid.*; accord *People v. Blakeley, supra,* 23 Cal.4th at p. 91.) As such, we reject appellant's claim that a conflict existed between these instructions regarding how to apply the doctrine of defense of another. We also reject his contention that the jury should have been instructed that, if they found imperfect defense of another, appellant was not guilty of attempted manslaughter. Appellant's position in that regard is incorrect as a matter of law.

Finally, we find unpersuasive appellant's argument that instructional error occurred because the trial court's modified instruction under CALCRIM No. 505 did not state that defense of another applies to attempted manslaughter. Pursuant to the instructions given under CALCRIM No. 604, the jurors were told that appellant was not guilty of *any crime* if he acted in complete defense of another. The trial court's instructions do not appear confusing or contradictory. Moreover, we presume the jurors are "intelligent and capable of understanding and applying the court's instructions. [Citation.]" (*People v. Gonzales, supra,* 51 Cal.4th at p. 940.)

Based on the context of the instructions as a whole, instructional error did not occur. There is no reasonable likelihood the jury applied the instructions in an impermissible manner. Accordingly, this claim fails. In any event, even if instructional error occurred, we also determine that any presumed error was harmless.

3. This record does not establish prejudice.

Appellant argues he was prejudiced from the erroneous instruction under CALCRIM No. 505, claiming "very strong evidence" supported a finding of complete defense of another. He notes that the jury deliberated over a period of three days and he was acquitted on some charges. He asserts the standard of review should occur under *Chapman, supra,* 386 U.S. 18 and his conviction of attempted voluntary manslaughter should be reversed. We disagree.

Errors in jury instructions are typically reviewed under *People v. Watson* (1956) 46 Cal.2d 818, 836. (*People v. Breverman* (1998) 19 Cal.4th 142, 178.) In contrast, review under *Chapman, supra,* 386 U.S. 18, occurs when instructional error improperly described or omitted an element of an offense, or raised an improper presumption, or directed a finding or a partial verdict upon a particular element. (*People v. Flood* (1998)

18 Cal.4th 470, 502-503.) Such an alleged error did not occur here. Accordingly, we apply the *Watson* standard of review. (*People v. Breverman, supra,* 19 Cal.4th at p. 178.)

An error requires reversal under *Watson* only where "an examination of the entire record establishes a reasonable probability that the error affected the outcome." (*People v. Breverman, supra,* 19 Cal.4th at p. 165, citing *People v. Watson, supra,* 46 Cal.2d at p. 836 & Cal. Const., art. VI, § 13; accord *People v. Wharton* (1991) 53 Cal.3d 522, 571.) Our Supreme Court has noted that *People v. Watson, supra,* 46 Cal.2d at p. 836 "requires a *reasonable* probability, not a mere *theoretical* possibility, that the instructional error affected the outcome of the trial." (*People v. Blakeley, supra,* 23 Cal.4th at p. 94.)

Here, during closing arguments, the prosecutor argued that appellant did not act in complete defense of another. The prosecutor noted that appellant, or someone else, hid the gun immediately after the shooting and appellant lied to the responding deputy. The prosecutor contended that appellant's actions strongly suggested that he knew he was not justified in shooting Juan Carlos. The trial evidence supports the prosecutor's closing arguments.

Further, although multiple men were likely striking Licea, no evidence established that these men had weapons. When the deputies arrived, Licea was relatively uninjured, he did not complain of any pain, and he declined medical attention. Despite appellant's arguments on appeal, it is questionable whether it was reasonable for appellant to discharge a potentially fatal shot at Juan Carlos.

Based on an examination of the entire record, there is not a reasonable probability that the presumed instructional error affected the outcome. Accordingly, even if we presume instructional error occurred, prejudice is not present and this claim fails.

V. The Trial Court Did Not Err In Permitting Testimony From A Deputy District Attorney And Any Presumed Error Was Harmless.

Prior to trial, Zepeda, who was one of the two bystanders who called 911 to report the fight, called the prosecutor's office and spoke with the prosecuting attorney. Another deputy district attorney, Harris Siddiq, overheard the conversation. At trial, Siddiq testified regarding Zepeda's call. Appellant claims the trial court erred in permitting this testimony.

A. Background.

1. Zepeda's relevant trial testimony.

During trial cross-examination, Zepeda admitted that he had called the prosecutor's office prior to trial. He called because an arrest warrant had been issued for him. During that telephone call, Zepeda told the prosecutor that he "never saw anything" and he did not know what the defense attorney wanted from him.

2. The deputy district attorney's trial testimony.

After appellant rested at trial, the prosecution presented certain rebuttal evidence, including the testimony of Siddiq, a deputy district attorney for Kern County. Appellant's defense counsel objected to Siddiq's proposed testimony. Prior to Siddiq's testimony, the trial court requested an offer of proof from the prosecutor. The prosecutor stated, in relevant part, that Siddiq would testify regarding the telephone call that occurred between Zepeda and the prosecuting attorney, which Siddiq had overheard. Zepeda was upset about a bench warrant for his nonappearance in court. Zepeda did not want to testify in this matter. Zepeda stated "he never saw anything" and he did not know what defense counsel wanted from him.

Appellant's defense counsel objected to Siddiq's testimony, arguing it was irrelevant and prejudicial. She also contended that this testimony called into question her

integrity. Finally, defense counsel claimed it was improper for the prosecutor to call as a witness a fellow prosecutor from the same felony trial unit.

The trial court rejected the idea that Siddiq's testimony impugned the integrity of defense counsel. The court ruled that Siddiq would be allowed to testify about the contents of the telephone conversation he heard involving Zepeda and the prosecuting attorney. Siddiq later testified consistent with the prosecutor's offer of proof.

B. Standard of review.

We review relevancy and Evidence Code section 352 rulings for abuse of discretion. (*People v. Weaver* (2001) 26 Cal.4th 876, 933.) "A trial court abuses its discretion when its ruling is outside the bounds of reason. (*People v. Waidla*, *supra*, 22 Cal.4th at p. 714.) Under this standard, a trial court's ruling will not be disturbed, and reversal of the judgment is not required, unless the trial court exercised its discretion in an arbitrary, capricious, or patently absurd manner that resulted in a manifest miscarriage of justice. (*People v. Rodriguez* (1999) 20 Cal.4th 1, 9-10.)

C. Analysis.

Appellant argues that Siddiq's testimony had little probative value because Zepeda had provided the same information on cross-examination, and he contends Siddiq's testimony was highly prejudicial "because it suggested to the jury that the defense attorney was trying to do something disreputable." Appellant further asserts Siddiq, as a member of the district attorney's office, was cloaked with credibility and the trial court should have prevented his testimony. We find these contentions unpersuasive.

1. The trial court did not err.

Relevant evidence is defined as having a "tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action." (Evid. Code, § 210.) A trial court may exclude otherwise admissible evidence if its probative value is

substantially outweighed by its prejudicial effect; that is, if its admission would result in the undue consumption of time, a danger of undue prejudice, confusion about the issues or the danger of misleading the jury. (Evid. Code, § 352.) "Evidence is substantially more prejudicial than probative [within the meaning of section 352] if, broadly stated, it poses an intolerable 'risk to the fairness of the proceedings or the reliability of the outcome' [citation]." (*People v. Waidla*, *supra*, 22 Cal.4th at p. 724.)

When determining the credibility of a witness, a jury may consider, in part, a statement made by the witness that is inconsistent with any part of the witness's testimony. (Evid. Code, § 780, subd. (h).) The jury may also consider the witness's attitude toward the action or toward the giving of testimony. (*Id.* at subd. (j).)

Here, Siddiq's testimony was relevant in establishing Zepeda's attitude as a trial witness. Although Zepeda had admitted on cross-examination that he made this call and did not want to testify, Siddiq's testimony corroborated that admission. Nothing suggests that Siddiq's proposed testimony would result in the undue consumption of time, a danger of undue prejudice, confusion about the issues or the danger of misleading the jury. (Evid. Code, § 352.)

Based on this record, the trial court did not exercise its discretion in an arbitrary, capricious, or patently absurd manner that resulted in a manifest miscarriage of justice. The trial court's ruling was not outside the bounds of reason. As such, an abuse of discretion is not present.

2. Any presumed error was harmless.

"'[T]he erroneous admission or exclusion of evidence does not require reversal except where the error or errors caused a miscarriage of justice. [Citation.] "A 'miscarriage of justice' should be declared only when the court, 'after an examination of the entire cause, including the evidence,' is of the 'opinion' that it is reasonably probable

that a result more favorable to the appealing party would have been reached in the absence of the error." [Citations.]' [Citations.]" *(People v. Fields* (2009) 175 Cal.App.4th 1001, 1018.)

Here, Siddiq's trial testimony did not suggest that appellant's defense counsel was trying to do something disreputable. We reject appellant's contention that this testimony somehow suggested that the defense attorney wanted to suborn perjury. To the contrary, this evidence merely corroborated Zepeda's reluctance to testify. Further, Siddiq's testimony was relatively short. Including cross-examination, his testimony covers 15 and a half pages in an otherwise extensive record.

Based on this record, it is not reasonably probable appellant would have obtained a more favorable result had the trial court not permitted Saddiq's testimony. A miscarriage of justice is not present. Accordingly, any presumed error is harmless and this claim fails.

DISPOSITION

The judgment is affirmed.

_____

BLACK, J.*

WE CONCUR:

_____

DETJEN, Acting P. J.

_____

MEEHAN, J.

_____

* Judge of the Fresno Superior Court assigned by the Chief Justice pursuant to article VI section 6 of the California Constitution.